ORIGINAL

No. 90-6616

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

JAMES R. STRINGER — PETITIONER

VS.

LEE ROY BLACK, Commissioner
Mississippi Department of Corrections, — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO THE STATE'S BRIEF IN OPPOSITION

Petitioner, James R. Stringer, respectfully replies to the State's Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, as follows:

The posture of this case is the same as Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731 (January 22, 1991) which, in the context of habeas corpus review, held unconstitutional the Florida Supreme Court's affirmance of Parker's death sentence without considering the mitigating circumstances in light of two invalid aggravating circumstances. Parker depends on the Eighth Amendment jurisprudence stressing the importance of individualized consideration in capital cases, characterized most recently by this Court in Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441 (1990). Parker and Clemons restate the fundamental principle that an appellate court may not reinstate a death sentence in light of

a factor which invalidates the decision by the original sentencer, without "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

This reasoning requires that Mr. Stringer's death sentence also be reversed. As the Court explained in Teague v. Lane, ___ U.S. ___, 109 S.Ct. 1060, 1069 (1989), "once a new rule is applied to the defendant in the case announcing the new rule, even-handed justice requires that it be applied retroactively to all who are similarly situated." For this reason, the Court addresses retroactivity of decisions as a threshold issue. Teague v. Lane, 109 S.Ct. at 1069. New rules will not be "applied or announced in cases on collateral review." Penry v. Lynaugh, 109 S.Ct. 2934, 2944 (1989). Therefore, the apparent explanation for this Court's decision in Parker is that no new rule was announced in Clemons or Parker.

Respondent argues that the State of Mississippi, unlike the State of Florida in Parker, interposed a timely defense that Clemons v. Mississippi should be held nonretroactive to cases pending in post-conviction proceedings. State's Brief in Opposition at 18. This attempt to distinguish Parker relies on a mistaken view of the record. According to the State:

> Petitioner contends that respondent intentionally waived the point when it did not raise Teague in the response to the supplemental brief filed by petitioner. We would point out that the Clemons issue was not the subject of the supplemental brief filed by petitioner. The issue raised in the supplemental brief was a claim under the Mills/McKoy precedent. It is hardly appropriate

> to respond to a claim that is not raised in a supplemental response. Therefore, respondent would submit that it never waived the claim and that the Fifth Circuit was not in error in allowing the defense to be raised.

Brief in Opposition at p. 18-19. To the contrary, James Stringer addressed the application of this Court's decision in Clemons as the leading issue in his Supplemental Brief in Support of Granting Certiorari, filed on April 5, 1990 in Stringer v. Black, No. 88-7000. The State's Supplemental Brief to this Court addressed and relied on Clemons, but did not raise the defense of the nonretroactivity of that decision. Consequently, assuming arguendo that this Court did not address the retroactivity of the "new rule" announced in Clemons and Parker because the State of Florida did not raise this defense, the same reasoning and holding apply to James Stringer.

The State argues that the constitutional challenge to the "heinous, atrocious, or cruel" aggravating circumstance has been waived in the state courts. This argument was rejected twice without comment by the court below. The State's assertion that the Fifth Circuit ruling is based in the alternative on the acknowledgement of a valid state procedural bar is unsupported by the opinions of the majority and the opinion of the dissent in the court below. Stringer v. Jackson, 862 F.2d 1108, 1113-1115, 1119-1126 (5th Cir. 1988); Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). The obvious reason for the Fifth Circuit's rejection of a procedural bar is that the state court did not procedurally bar this issue.

The State's discussion of the procedural history of this case at pages 2-9 of the Brief in Opposition mischaracterizes the opinions by the state courts and leaves some substantial gaps which explain why the Mississippi courts did not invoke a procedural bar. The State does not mention that the Mississippi Supreme Court reviewed the "especially heinous, atrocious, or cruel" aggravating circumstance during direct appeal proceedings as part of its statutory review.[1] Stringer v. State, 454 So.2d 468, 479 (Miss. 1984). The State also omits that James Stringer, in his petition for rehearing on direct appeal, specifically challenged the vague application of the "especially heinous, atrocious or cruel" aggravating circumstance relying upon Godfrey v. Georgia, 446 U.S. 420 (1980). While the State's Brief (p. 5) chronicles the modification of the direct appeal opinion as a result of the petition for rehearing, it fails to observe that the Mississippi Supreme Court did not procedurally bar the Eighth Amendment challenge to this aggravating circumstance. Finally, the State's claim (State's Brief at p. 23) that the Mississippi Supreme Court made a "plain statement" invoking a state procedural bar of this particular issue in post-conviction proceedings is simply wrong. Stringer v. State, 485 So.2d 274, 275 (Miss. 1986).

[1] The Mississippi Supreme Court has invoked its statutory role pursuant to Miss. Code Ann. Sections 99-19-105 to review the constitutionality of the "especially heinous, atrocious or cruel" aggravating circumstance even where the aggravating circumstance was not specifically challenged at trial or on appeal. See, e.g., Clemons v. State, 535 So.2d 1354, 1362 (Miss. 1988); Pinkney v. State, 538 So.2d 329, 355 (Miss. 1988).

The State either misunderstands or fails to address Issues I and II of James Stringer's Petition for Writ of Certiorari. The State admits that the state court never invoked a state automatic affirmance rule, but gives no reason why the "plain statement" rule of Long and Harris should not apply in these circumstances.[2] Brief in Opposition at p.20. Furthermore, the State gives no reason why this Court's determination in Clemons that a rule of automatic affirmance did not clearly or uniformly apply in Mississippi should not bind the Court of Appeals for the Fifth Circuit.

Wherefore, premises considered, James Stringer respectfully requests the Court to grant the writ of certiorari, and either summarily reverse the decision by the Court of Appeals and grant the writ of habeas corpus, or vacate the judgment of the Court below and remand for further consideration in light of Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731 (1991).

Respectfully submitted,

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[2] This Court has already found that a state harmless error rule is subject to the Long doctrine. Delaware v. Van Arsdale, 475 U.S. 673 (1986). The State makes no effort to distinguish Van Arsdale.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing pleading was this date posted via first class mail, postage prepaid, to Hon. Marvin L. White, Jr., Assistant Attorney General, P.O. Box 220, Jackson, MS. 39205.

This the 18th day of March, 1991.

Kenneth J. Rosé

No. 88-7000
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1988 TERM

JAMES R. STRINGER — **Petitioner**

VERSUS

LEE ROY BLACK, Commissioner, Mississippi Department of Corrections — **Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

COMES NOW the respondent by and through counsel and files this supplemental brief in opposition to the granting of certiorari. The recent spate of decisions in cases involving the death penalty requires this brief.

First we would further address the claim raised under Question I relating to the decision in Mills v. Maryland, 486 U.S. 367 (1988) and the more recent decision in McKoy v. North Carolina, ___ U.S. ___, 58 U.S.L.W. 4311 (March 5, 1990).

While we still maintain the claim is procedurally barred under the provisions of Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982), we would further submit that the claim is barred under this Court's recent rulings in Teague v. Lane, 489 U.S. ___, 103 L.Ed.2d 334 (1989) and Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989) as amplified in

Butler v. McKellar, ___ U.S. ___, 58 U.S.L.W. 4294 (March 5, 1990) and Saffle v. Parks, ___ U.S. ___, 58 U.S.L.W. 4322 (March 5, 1990). Clearly there should be no retroactive application of the ruling in Mills and the later decision in McCoy as they constitute new rules of law. Further, Mills/McKoy do not fall into the exceptions allowing retroactivity listed in Teague and Penry as the rule in Mills/McKoy would neither decriminalize a class of private conduct nor prohibit the imposition of capital punishment on a particular class of persons. Neither is the decision in Mills a "watershed rule of criminal procedure" that the second exception in Teague contemplates.

Petitioner's conviction became final on direct appeal when certiorari from the Mississippi Supreme Court was denied on February 19, 1985. Stringer v. Mississippi, 469 U.S. 1230 (1985). Mills was not decided until June 6, 1988 and McKoy on March 5, 1990.

Teague is a rule limiting the jurisdiction of the federal courts to entertain claims presented on habeas. A reading of Saffle and Butler leave little doubt that the rule in Mills/McKoy is new law. In Saffle and Butler we find instruction as to what type rulings will be applied retroactively. In Saffle the petitioner urged that an instruction given in the penalty phase of the trial, telling the jury to avoid any influence of sympathy, violated the Eight Amendment. In reaching its decision that petitioner urged a "new rule" of law as a ground for reversal, the Court considered Lockett v. Ohio, and Eddings v.

Oklahoma, determining that neither spoke directly, if at all, to the issue presented here since Parks was asking the court to create a rule relating, not to what mitigating evidence the jury must be permitted to consider, but to how it must consider the mitigating evidence. Furthermore, the Court refused to find assistance in California v. Brown, 479 U.S. 538 (1987),[1] since a reasonable juror would interpret the instruction to ignore mere sympathy "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence." It was not unconstitutional for a state to expect a reasoned moral response and prohibit juries from basing their decisions on factors not present at trial. Saffle, 489 U.S. at ___, 58 U.S.L.W. 4324.

Further explaining the definition of a "new rule" in Butler, the Court declared that the rule of Arizona v. Roberson 486 U.S. 675 (1988), is a "new rule" of law since its result was not dictated by precedent existing at the time defendant's conviction became final. It rejected the argument that Edwards v. Arizona, 451 U.S. 477 (1981), dictated the result in Roberson since Roberson would be merely an extension of the prophylactic rule in Edwards which requires the police, during continuous custody, to refrain from all further questioning once an accused invokes his right to counsel until counsel is furnished. The rule in

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1 In Brown the court held that an instruction telling the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings," during the sentencing phase did not violate the Eighth Amendment.

Roberson, which extended the Edwards rule to the context of a separate investigation is a new rule of law and not applicable to Butler on collateral review. By analogy, the rule in Mills/McKoy condemning the unanimity requirement as it relates to mitigating circumstances was not predicted by prior federal cases.

Addressing the effect of language used by court's in deciding cases the opinion Butler reads:

> But the fact that a court says that its decisions within the "logical compass" of another decision, or indeed that it is 'controlled" by prior decision , is not conclusive for the purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In Roberson, for instance, the Court found Edwards controlling but acknowledged a significant difference opinion on the part of several lower courts that had considered the question previously. 486 U.S., at 679, n. 3. That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. We hold, therefore, that Roberson announced a "new rule."

58 U.S.L.W. at 4297.

The Court, in reaching its conclusions in Butler and Saffle, relied heavily on the law prevailing at the time that the petitioner's conviction became final. As Justice Brennan said in his dissent in Butler, in regard to adjudicating the claim by reference to the prevailing law at the time of the conviction, "rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breath of

their application. A judge must thereby discern whether the principles applied to specific patterns in prior cases fairly extend to govern analogous factual patterns." Butler, 58 U.S.L.W. at 4299. In reviewing petitioner's claims under the prevailing law at the time that his conviction became final, it is clear that the principles regarding a death penalty hearing at that time, when applied to the specific facts of this case, did not predict the outcome of Mills/McKoy.

Finally, we must look to see whether or not the "new rule" of Mills/McKoy fall into one of the two exceptions set forth in Teague. The Court held in Penry and repeated in Saffle that a new rule of constitutional law will not be applied in cases on collateral review unless the rule comes within one of the two narrow exceptions. This limitation on the proper exercise of habeas corpus jurisdiction applies to capital and non-capital cases. Since petitioner's capital conviction became final before Mills was decided in 1988, this claim is barred from consideration by this Court by the jurisdictional bar of Teague.

Clearly petitioner cannot make use of the first exception to the applicability of a "new rule". The first exception permits the retroactive application of a 'new rule" if the rule places a class of private conduct beyond the power of the state to proscribe, Teague, 103 L.Ed.2d at 356, or addresses a "substantive categorical guarantee accorded by the constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense."

Penry. 106 L.Ed.2d at 285; Saffle, 58 U.S.L.W. at 4324-4325. Since petitioner can not contend that the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against the death penalty, his Mills/McKoy claim does not qualify for the first exception under Teague.

The second exception is for "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of criminal proceedings. Butler, 58 U.S.L.W. at 4297; Saffle, 58 U.S.L.W. at 4325. The objectives of fairness and accuracy are central to the theme of "watershed rules". Stated another way, "watershed rules" are those rules that are essential to obtaining a reliable verdict that guarantees the fairness and accuracy of the proceeding. In considering which rules would be "watershed rules", the Court held:

> [W]e are also of the view that such rules are 'best illustrated by recalling the classic grounds from the issuance of writ of habeas corpus--that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from he defendant by brutal methods.' Rose v. Lundy, [cite omitted].

Teague, 103 L.Ed.2d at 358.

In Saffle, we get further guidance as to the application of the second exception by the following:

> Although the precise contours of this exception may be difficult to discern, we have usually cited Gideon v. Wainwright, 372 U.S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception. . . . Whatever one may think of the importance of

> respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in Gideon or other rules which may be thought to be within the exception.

58 U.S.L.W. at 4325.

The rule set forth in Mills/Mckoy does not fall into the category of a "watershed rule". Therefore, there can be no retroactive application of this rule by this Court.[2]

Petitioner makes no attempt in his motion to demonstrate why Mills and McKoy are not new law other than to state that the Court's opinion "indicated that its decision was dictated by its unbroken line of precedent." Butler teaches us that such language cannot be relied upon in making the Teague analysis. It is clear that never before the decision in Mills was there any indication that the States were not free to require that the jurors must find mitigating circumstances unanimously before considering that circumstance. The fact that two states read into the capital punishment literature that this was allowable is

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2 It is interesting to note the dissent from the granting of certiorari in McNeil v. North Carolina, No. 88-7081 for reconsideration in light of McKoy. The four dissenters stated:

> On remand, the North Carolina Supreme Court remains free to consider these facts, or nay others that may affect the determination whether our opinion in McKoy requires alteration of its judgment. Similarly, incases where there is a question of procedural default, e.g., Artie v. North Carolina, 494 U.S. ___ (1990) (No. 89-6526), or where a unanimity requirement may have been harmless due to failure to present mitigating evidence, e.g., Hunt v. North Carolina, 494 U.S. ___ (1990) (No. 88-6684); Laws v. North Carolina, 494 U.S. ___ (1990) (No. 89-5837), these issues remain open for examination on remand.

Slip opinion attached as Exhibit A.

sufficient under the Butler analysis to show that this is new law.

Mills/McKoy represents a new rule under Teague therefore this Court has no jurisdiction to consider any claim under that ruling. While we submit that the claim procedurally barred under Sykes, we raise and address this additional bar so that the Court may be assisted in the exercise of its discretionary certiorari jurisdiction.

The claim raised under Question II of the petition involved the alleged invalidity of the "especially heinous, atrocious or cruel" aggravating circumstance in this case. We still maintain, as we did in our Brief in Opposition, that this claim was held to be procedurally barred by the district court and the court below, therefore the court has no jurisdiction to consider the claim. We do note that any question of the constitutionality of an appellate court affirming a sentence of death after finding an invalid aggravating circumstance has been resolved by the decision in Clemons v. Mississippi, ___ U.S. ___ (March 28, 1990). No constitutional infirmity exist in an appellate court performing a reweighing or harmless error analysis and affirming the sentence in the face of an invalid aggravating circumstance.

Finally, while the claim here is clearly barred, the argument under Question III claiming that the constitution requires the jury be told that it can return a life sentence even if the aggravating circumstances outweigh the mitigating circumstances or that they do not have to find any mitigating

circumstances to return a life sentence is clearly controlled by Boyde v. California, ___ U.S. ___, 58 U.S.L.W. 4301 (March 5, 1990) and Blystone v. Pennsylvania, ___ U.S. ___, 58 U.S.L.W. 4274 (February 28, 1990), no such instruction must be given.

Since the claims are all procedurally barred from consideration under Sykes and/or Teague certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States POstal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **SUPPLEMENTAL BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI** to the following:

James E. Ostgard, Esquire
1625 Park Avenue
Minneapolis, Minnesota 55404

Kenneth J. Rose, Esquire
300 W. Markham
Durham, N.C. 27701

This the 29th day of March, 1990.

MARVIN L. WHITE, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

WILLIAM L. WILEY — **PETITIONER**

VERSUS — CIVIL ACTION NO. DC88-132-B-O

STEVE W. PUCKETT, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY, ET AL — **RESPONDENTS**

RESPONDENT'S MEMORANDUM IN SUPPORT OF ANSWER AND RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the respondent in the above-styled and numbered matter and files this memorandum in support of the answer and return to the petition for writ of habeas corpus filed herein. Petitioner is lawfully in the custody of Steve W. Puckett, Superintendent of the Mississippi State Penitentiary, under a sentence of death after having been convicted in the Circuit Court of DeSoto County, Mississippi for the crime of capital murder. During the Special September, 1981 Term of the Circuit Court of DeSoto County, Mississippi, the Grand Jury indicted petitioner for capital murder. The indictment grew out of the August 22, 1981 murder of Mr. J. B. Turner. The petitioner was tried in February, 1982 before a properly empaneled jury and after hearing evidence and deliberating thereon, the jury returned a verdict of guilty of capital murder. In a separate hearing, he was sentenced to death. On appeal of those findings, the Mississippi Supreme Court unanimously affirmed the conviction of guilt, but reversed the original death

Petitioner's direct appeal was final October 14, 1986 when the United States Supreme Court denied his petition for certiorari. His attempt to rely on Maynard, decided June 6, 1988, therefore requires a Teague analysis. If Maynard announced a new rule, petitioner will not be able to rely on the retroactive application of Maynard to his claim unless the rule falls into one of the two exceptions outlined above. In Teague, Justice O'Connor found that it was difficult to determine when a new rule was announced, but:

> In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government....To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.
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> 103 L.Ed.2d at 349 (citations omitted, emphasis in original).

A review of Maynard leads to the conclusion that no new rule was established by that case. The Supreme Court in Maynard stated: "We think the Court of Appeals was quite right in holding that Godfrey controls this case." 100 L.Ed.2d at 382. As the precedent of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), controlled or "dictated" the holding in Maynard, no new rule was created and Teague does not intervene to bar this Court's review of petitioner's claim.

Respondent would next point out that Mississippi law does not require the element of torture to be present in a crime for the heinous, atrocious or cruel aggravating circumstance to apply. Pinkney v. State, 538 So.2d 329 (Miss.1988). We would

issues which are barred on this Court's habeas review. Petitioner has not shown cause and prejudice to overcome these bars, thus, any procedural default in state court proceedings is not prejudicial to petitioner. There is no merit to this subclaim.

The record reveals that the acts at issue in this claim of ineffective assistance by counsel at the sentencing phase were either sound strategy or not errors. Furthermore, there has been no showing that but for these acts, the result of the proceeding, the sentence of death, would have been different. Petitioner is not entitled to an evidentiary hearing. Trial counsel's performance was effective and there was no prejudice to petitioner. As neither prong of the Strickland test has been satisfied, petitioner's claim here is without merit.

CONCLUSION

Respondent submits that there is no need for an evidentiary hearing as petitioner has had an opportunity for a full and fair hearing of the constitutional claims that he presents. There are no factual conflicts that are required to be decided that cannot be decided from the record now before the Court.

WHEREFORE, PREMISES CONSIDERED, respondent would respectfully submit that the petition for writ of habeas corpus in this case be denied, the stay of execution entered herein be vacated, and any application for certificate of probable cause

be denied in order that the lawful sentence of death imposed by the Circuit Court of DeSoto County can be carried out.

Respectfully submitted,

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